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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNIFICATION CHURCH, ET AL., PETITIONERS

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provision and regulation involved	3
Statement	3
A. The Unification Church Case	3
B. The Keiko Asai Case	6
Argument	8
Conclusion	16

CITATIONS

Cases:

Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U.S. 327	15
Califano v. *Sanders*, 430 U.S. 99	15
Chen Fan Kwok v. *Immigration and Naturalization Service*, 392 U.S. 206	15
Federal Communications Commission v. *Allentown Broadcasting Corp.*, 349 U.S. 358	14
Fiallo v. *Levi*, 406 F. Supp. 162, affirmed *sub nom. Fiallo* v. *Bell*, 430 U.S. 787	9, 15
Ibrahim v. *Kiley*, 420 F. Supp. 13	15
Japanese Immigrant Case, The, 189 U.S. 86	14
Kleindienst v. *Mandel*, 408 U.S. 753	8-9
Matter of B—, 7 I & N Dec. 1	14
Matter of Sourbis, 11 I & N Dec. 335	7
Murdock v. *Pennsylvania*, 319 U.S. 105	11

Cases—Continued — Page

Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80 — 10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 — 14

Constitution, statutes and regulations:

United States Constitution, First Amendment — 3, 8, 9, 11
Administrative Procedure Act:
5 U.S.C. 551 *et seq.* — 5
5 U.S.C. 557(b) — 14
Immigration and Nationality Act, 66 Stat. 166, as amended, 8 U.S.C. 1101, *et seq.*:
Section 101(a)(15), 8 U.S.C. 1101(a)(15) — 3, 9, 12
Section 101(a)(15)(h)(iii), 8 U.S.C. 1101(a)(15)(h)(iii) — 3
Section 21(c), 8 U.S.C. 1184(c) — 3, 4, 9
Section 279, 8 U.S.C. 1329 — 15
8 C.F.R. 103(3) — 14
8 C.F.R. 103.1(m)(11) — 14
8 C.F.R. 103.2(b)(2) — 6
8 C.F.R. 214(h)(6) — 6
8 C.F.R. 214.2(h)(4) — 3
8 C.F.R. 214.2(h)(4)(ii) — 12
8 C.F.R. 214.2(h)(6) — 13

Miscellaneous:

Gordon & Rosenfield, *Immigration Law & Procedures* (rev. ed. 77) — 14
Davis, *Administrative Law Text* (1972) — 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported. The two opinions of the district court (Pet. App. 19a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1978. The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial of visa petitions seeking to classify a group of aliens as missionary trainees, on the ground that the church sponsoring them was not conducting a *bona fide* training program, contravened the Free Exercise Clause of the First Amendment.

2. Whether the Regional Commissioner's denial of the petitions was in fact grounded on a determination that the church was not conducting a *bona fide* training program.

3. Whether the Regional Commissioner's reliance on the aliens' fund-raising activities as evidence that the church was not conducting a *bona fide* training program was improper.

4. Whether the church was prejudiced by the Regional Commissioner's failure to remand the case to the District Director.

5. Whether petitioner Asai was deprived of due process because she was not permitted to challenge the District Director's denial of her application for an extension of her stay in the United States during her deportation hearing, though she could do so in district court.

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The pertinent portions of the First Amendment to the United States Constitution and of 8 C.F.R. 214.2 (h)(4) are reprinted at Pet. v. and viii.

STATEMENT

A. The Unification Church Case

Petitioner Unification Church (the Church) is an international interfaith religious movement (Pet. App. 2a). In 1972 the Church instituted a program to bring some of its foreign members to the United States as "missionary trainees" (see Pet. 1-2; Pet. App. 20a). Under the program, approximately 600 aliens have been admitted to this country (Pet. 2). Beginning in January 1974, the Church sought to clarify the immigration status of its trainees and to enable them to remain in this country for a longer period than that for which they had been admitted (Pet. App. 28a, 2b). To this end the Church filed four visa petitions with the Immigration and Naturalization Service (INS) pursuant to 8 U.S.C. 1184 (c), seeking to classify a total of 583 aliens as missionary trainees pursuant to 8 U.S.C. 1101 (a)(15) (h)(iii).[1] These petitions are known as "H-3" petitions.

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[1] 8 U.S.C. 1101(a)(15) provides in pertinent part:

> The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

The Church's H-3 petitions were denied by the New York District Director of the INS (J.A. 76, 125-130).[2] His decisions were affirmed by the Northeast Regional Commissioner,[3] who stated (Pet. App. 79a):

> The record further reveals that many of the beneficiaries—as well as other aliens not currently covered by an approved or pending H-3 petition—were located in various towns and cities throughout the United States engaged in the sale

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(H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (iii) who is coming temporarily to the United States as a trainee * * *.

Before an alien can achieve "H-3" status, his employer must file an acceptable petition with the Attorney General. 8 U.S.C. 1184(c) states:

> The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

[2] "J.A." refers to the joint appendix filed with the court of appeals.

[3] The Regional Commissioner affirmed the District Director's denial of the first of these petitions on May 20, 1974 (Pet. App. 73a-94a). The Regional Commissioner affirmed the denial of the remaining three petitions on May 23, 1974 (Pet. App. 45a-72a).

> of such merchandise as tea, flowers, candles, peanuts and candy in shopping centers, on the streets, and on a door-to-door basis, and soliciting donations on behalf of the Unification Church. In a number of instances, arrests by police authorities resulted because the solicitation of funds was in violation of local ordinances. Some of these aliens had been in this country less than a few weeks' time, one such individual having been admitted about one week earlier. Many of the aliens encountered by Service officers were found to be in the United States unlawfully by reason of having remained here beyond their authorized period of stay.

The Commissioner concluded (Pet. App. 93a):

> Despite the assertion that such solicitations are only a small part of the overall field experience, information received from various Service officers throughout the United States substantiates that the beneficiaries have been widely and repeatedly engaged in such pursuit. We are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes.

The Church sought review in the United States District Court for the District of Columbia under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, arguing that these passages revealed that the Commissioner had violated INS regulations prohibiting decision-making on the basis of adverse informa-

tion not made available to the affected party. See 8 C.F.R. 103.2(b)(2), 214.2(h)(6).[4] The district court, finding that the Regional Commissioner had relied on evidence that the Church had not been given an opportunity to rebut, held that the case must be remanded "to the Regional Commissioner and reopened to provide the plaintiff the opportunity to inspect and rebut the adverse information" (Pet. App. 31a-32a).

On remand, the Regional Commissioner made available to the Church all adverse information in his files, and the Church submitted a memorandum in response to this information (Pet. App. 5a). The Commissioner then reaffirmed his earlier decision (Pet. App. 34a-44a), and his ruling was in turn affirmed by the district court, which granted summary judgment for the Attorney General (Pet. App. 19a-26a). The court of appeals affirmed (Pet. App. 1a-9a, 18a).

B. The Keiko Asai Case

After the denial of the H-3 petitions by the New York District Director and the initial affirmance of the denial by the Northeast Regional Commissioner, petitioner Keiko Asai, one of the Unification Church's

[4] 8 C.F.R. 103.2(b)(2) states that if an application presented to the INS may be denied on the basis of derogatory evidence of which the applicant is unaware, the applicant should be "advised thereof and offered an opportunity to rebut it and present evidence in his behalf before the decision is rendered * * *." In connection with the adjudication of petitions for alien trainees, 8 C.F.R. 214.2(h)(6) provides that, "If an adverse decision is proposed on the basis of any evidence not submitted by the petitioner, he shall be so notified before a final decision is made and invited to inspect and rebut such evidence."

"missionary trainees," applied for an extension of her stay in the United States (Pet. App. 10a). On September 5, 1974, the District Director denied her application, without a hearing, stating as his reason that she had " 'failed to establish that the purpose for which [she was] admitted has not been accomplished and that [her] requested extension is not merely an attempt to prolong [her] stay indefinitely' " (*ibid.*). Asai was instructed "to depart from the United States not later than September 20, 1974" (*ibid.*).

When Asai failed to depart from the United States as instructed, she was served with an order to show cause why she should not be deported (*ibid.*). At her deportation hearing, the immigration judge ruled that her deportability had " 'been established by clear, convincing, and unequivocal evidence' " (*ibid.*). Relying on *Matter of Sourbis*, 11 I & N Dec. 335 (B.I.A.), the immigration judge held that it was unnecessary to consider whether the purpose for which Asai had been admitted to the United States had been accomplished or whether she was merely attempting to prolong her stay indefinitely, because he had no jurisdiction " 'to make any determination as to the propriety of the District Director's decision' " denying her application for an extension of her stay (Pet. App. 11a). Asai and 41 similarly situated members of the Church filed an administrative appeal, and the Board of Immigration Appeals affirmed the decision of the immigration judge (Pet. App. 1b-8b).

Asai and 14 other members of the Church[5] then

[5] The other petitioners were Franz Haimdienst, Yoshibiro Ichijo, Sumiko Ishii, Machiko Kobayashi, Yoko Kobayashi,

sought review in the Court of Appeals for the District of Columbia Circuit. The parties stipulated that the issues on appeal were identical with respect to each of the 15 petitioners, that Asai's case was representative, and that the administrative record in her case contained all the necessary materials for decision of the issues raised by all the petitioners (see Pet. App. 10a and n. 9). The court of appeals consolidated the case with the Church's appeal, and it affirmed the Board's decision upholding the orders of deportation (Pet. App. 10a-18a).

ARGUMENT

1. The Church contends (Pet. 16-18, 23-29) that the denial of its H-3 visa petitions involved an intrusion into its religious training program that infringed its rights under the Free Exercise Clause of the First Amendment. The contention is without merit.

As the court of appeals held (Pet. App. 9a), the Northeast Regional Commissioner made a facially legitimate threshold determination that the training program was not *bona fide*, and the Church's challenge to the denial of its H-3 visa petitions is therefore foreclosed by this Court's decision in *Kleindienst*

Takahumi Morikawa, Hironi Onishi, Kuniko Onishi, Michiyo Ota, Fumiko Ozeki, Emiko Seki, Miyoko Tanaka, Kuniko Watanabe, and Noriyoshi Saito. Since it appears that these petitioners in the court of appeals join Asai in the instant petition, references to Asai in the argument portion of this brief refer to these other petitioners as well.

v. *Mandel*, 408 U.S. 753, 769-770. In *Mandel*, the Attorney General denied the application for a temporary non-immigrant visa submitted by a Belgian Marxist on the ground that during previous trips to the United States he had failed to conform to his itinerary and to limit his activities to his previously stated purposes. Several university professors who were United States citizens brought an action to compel the Attorney General to grant the visa to Mandel, claiming that his refusal to do so abridged their First Amendment rights to participate in academic conferences and exchanges with Mandel in the United States. This Court held, however, that when the Executive exercises its power to refuse to admit aliens on the basis of a facially legitimate and *bona fide* reason, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770.

The same analysis applies here. The Attorney General is authorized to admit nonimmigrant aliens as trainees pursuant to 8 U.S.C. 1101(a)(15) and 1184 (c). The denial of the H-3 visa petitions in this case was based on the facially legitimate determination that the Church had not established a *bona fide* training program. There is no warrant for the courts to look behind this exercise of discretion. See also *Fiallo* v. *Bell*, 430 U.S. 787, 792.

2. Petitioners contend (Pet. 15-24), however, that the court of appeals failed to judge the Regional Com-

missioner's decision on the grounds that the record discloses the Commissioner himself relied on, as required by *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80. Citing several portions of the Commissioner's decision, petitioners urge (Pet. 19-21) that the record contains no finding by the Commissioner that the Church was using its so-called trainees as fund raisers, rather than training them.

This contention is not supported by the record. In his first decision, the Regional Commissioner held (Pet. App. 93a): "[w]e are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes." After the reopening of the record to permit petitioner to review and rebut adverse information, the Commissioner reached the same conclusion (Pet. App. 37a): "that the field activities of the Petitioner, which comprise two thirds of the training time, are to solicit monies rather than provide substantial training." Accordingly, the Regional Commissioner held (Pet. App. 42a-43a) that "[t]he petitions in question were denied because the Petitioner failed to satisfactorily establish a bona fide training program within the interpretation of law," and he affirmed that denial.[6]

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[6] As the court of appeals correctly recognized (Pet. 8-9), the Regional Commissioner's other comments regarding the administration, development, utility, and need for the training program (see Pet. ii) are irrelevant, since the Commissioner's threshold finding is a sufficient basis for denial of the petitions.

In support of its contention that the denial of its H-3 petitions in this case was motivated by prejudice against it, the Church cites (Pet. 22-24; Pet. Apps. C-F) a number of administrative decisions in other cases that are not before this Court. Although we do not agree with petitioners' contention (Pet. 23 n. 10) that those decisions indicate a "purpose on the part of INS to deny all applications and petitions filed by members of the Unification Church, regardless of merit," we do not consider it necessary or appropriate to analyze those decisions here.

3. The Church next urges (Pet. 24-29) that the Regional Commissioner erred in relying on the predominance of fund raising as a basis for concluding that the Church was not operating a *bona fide* training program.

a. Petitioner relies primarily (Pet. 24-27) on this Court's decision in *Murdock* v. *Pennsylvania*, 319 U.S. 105, holding that missionary evangelism activities, including the sale of Bibles or religious articles to defray expenses, are protected by the First Amendment. Petitioner claims that therefore the Regional Commissioner could not properly deny the Church's H-3 petitions on the basis of his finding that the missionary trainees were primarily engaged in similar fund-raising activities (Pet. 24-27).

No such conclusion follows from *Murdock*. The Regional Commissioner did not suggest that the Church's fund-raising activities were improper or were not protected by the First Amendment—just as this Court made no such suggestion about the academic activities in *Mandel*, *supra*. The question before the

Regional Commissioner was a narrow one: whether the Church was conducting a training program within the purview of Section 101(a)(15) of the Immigration and Nationality Act, 66 Stat. 167, as amended, 8 U.S.C. 1101(a)(15). The Regional Commissioner determined only that a program in which the majority of the alien's time was devoted to fund raising, not to training, did not qualify as a *bona fide* training program.

Petitioners do not challenge the authority of Congress to provide for the extended admission of alien trainees without making the same provision for fund raisers, religious or otherwise. The provision Congress has made for alien trainees required the Regional Commissioner to determine whether the aliens in this case would be taking part in a training program, or whether they would be engaged primarily in fund raising. That is the determination he made.

b. The Church also contends (Pet. 22, 27-28) that the Commissioner's reliance on the trainees' fund raising activities contravened 8 C.F.R. 214.2(h)(4)(ii), which provides that "[t]he source of any remuneration received by a trainee and whether or not any benefit will accrue to the petitioner are not material * * *." This argument is insubstantial. The Regional Commissioner was not concerned either with the source of the trainees' remuneration or with whether the Church would benefit from the activities of the trainees—but with whether the Church had established a *bona fide* training program, as distinguished from a program aimed primarily at raising

funds. The regulation does not, and could not, alter the statutory limitation that H-3 permits may be granted only to enable aliens to attend training programs.

4. Finally, the Church argues (Pet. 29-32) that the Regional Commissioner erred in failing to remand the case to the District Director. The Church contends (Pet. 30) that on remand from the district court it was entitled to *de novo* review before the District Director, who would have been required, under 8 C.F.R. 214.2(h)(6), to set forth the facts he deemed pertinent and the specific reasons for his conclusions. The Church urges that review before the Regional Commissioner was not an adequate substitute.

However, as the court of appeals found, the Church was not prejudiced by the lack of a remand to the District Director (Pet. App. 6a-7a). Although the Commissioner invited the Church to introduce new evidence, the Church "neither proffered nor introduced any" (*ibid.*). Since the case was originally heard by the District Director and since the Church chose not to introduce any new evidence when the case was reopened, the Church could not suffer prejudice from the fact that it was not afforded a second review by the District Director on the same evidence.

In any event, the court below also correctly held (Pet. App. 7a) that "the commissioner independently concluded that [the Church] had not met 'the burden imposed upon [it] by regulation,'" and that "[t]his conclusion is not beyond the Commissioner's authority

under INS regulations." INS Regional Commissioners can and do make *de novo* findings of fact, just as the Board of Immigration Appeals does. See 8 C.F.R. 103.1(m)(11), 103(3); cf. *Matter of B—*, 7 I & N Dec. 1 (A.G.); 1 Gordon and Rosenfield, *Immigration Law and Procedure* § 1.10e, pp. 1-57 to 1-60 (rev. ed. 1977). The powers exercised by the Regional Commissioners are essentially the same as those exercised by an administrative agency reviewing the initial decision of a hearing examiner, where "the agency has all the powers which it would have in making the initial decision * * *." 5 U.S.C. 557 (b); see Davis, *Administrative Law Text*, § 10.05, p. 222 (1972); *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492; *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364. Thus, petitioner received from the Regional Commissioner the decision to which it was entitled.

5. Petitioner Asai contends (Pet. 32-38) that she was denied due process because the immigration judge found that she was deportable without giving her a hearing on her application for an extension of her visitor's visa. She urges that under *The Japanese Immigrant Case*, 189 U.S. 86, 100-101, due process requires that an alien who has entered the country must be given an "opportunity to be heard upon the questions involving his right to be and remain in the United States" before he is deported.

But, as the court of appeals pointed out (Pet. App. 17a), although the District Director's refusal to extend Asai's visa was not subject to review in the deportation hearing, it was subject to review in the district court.[7] Asai had the opportunity to present to the district court any evidence that the District Director's failure to extend her visa was arbitrary, capricious, or otherwise not in accord with law. Especially since the granting of an extension is a decision committed to executive discretion, this opportunity satisfied her claim to due process (Pet. App. 17a). Asai cannot now complain that the immigration judge gave conclusive effect to the District Director's decision, since she did not avail herself of her right to challenge that decision.[8]

[7] Petitioners suggest (Pet. 33 n. 13) that the court of appeals erred in concluding that the District Director's decision was subject to review under the Administrative Procedure Act. They cite *Califano* v. *Sanders*, 430 U.S. 99, which holds that the A.P.A. is not an independent grant of subject matter jurisdiction. But the court of appeals correctly looked to the A.P.A. for the standard of review; jurisdiction would be invoked under Section 279 of the Immigration and Nationality Act, 8 U.S.C. 1329. See *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 210; *Ibrahim* v. *Kiley*, 420 F. Supp. 13, 15 (S.D.N.Y.); *Fiallo* v. *Levi*, 406 F. Supp. 162, 165 (E.D.N.Y.), affirmed *sub nom. Fiallo* v. *Bell*, 430 U.S. 787.

[8] Asai's reliance (Pet. 34-35) on *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, is misplaced. In *Ashbacker*, although the right to a hearing on a license application had been preserved in form, it had been rendered a nullity by the Commission's previous decision to award the license to another applicant. Here the opportunity to be heard is not a nullity; there is simply a bifurcated system, channelling review of the District Director's decision to the district court, while the decision on deportability is made by the immigration judge subject to review in the court of appeals.

Asai argues (Pet. 38) that these procedures result in an undesirable two-step review process that "invites a proliferation of litigation * * *." She may be correct, but that does not establish a denial of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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